

1 HONORABLE RICARDO S. MARTINEZ
2 UNITED STATES DISTRICT COURT JUDGE
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL HOME LOAN MORTGAGE)
CORPORATION,)
Plaintiff,) Case No. 2:15-cv-00881-RSM
v.)
JOHN DOE, JANE DOE and all Occupants of) **FREDDIE MAC'S RESPONSE TO**
the Premises located at 8361 Seabreeze Court,) **BROWN'S MOTION TO REMAND**
Blaine WA 98230,)
Defendants.)
ROBERT BROWN, an individual,)
Third-Party Plaintiff,)
v.)
NORTHWEST TRUSTEE SERVICES, INC., a)
Washington Corporation; RCO LEGAL PS, a)
Washington Professional Services)
Organization; WELLS FARGO BANK, N.A.)
Third-Party Defendants.)

FREDDIE MAC'S RESPONSE
TO BROWN'S MOTION TO REMAND
Case No. 2:15-cv-00881-RSM

105727.1662/6372557.3

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FREDDIE MAC'S RESPONSE
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I. INTRODUCTION AND RELIEF REQUESTED

Counterclaim Defendant Federal Home Loan Mortgage Corporation (“Freddie Mac”) respectfully files this response to Dkt. # 11, the Motion to Remand filed by Counterclaim Plaintiff Robert Brown (“Brown”). 12 U.S.C. § 1452(f)(3) grants Freddie Mac the broad right to remove civil actions “at any time before trial.” Freddie Mac properly removed this action within the parameters of § 1452(f)(3), after Brown brought counterclaims and Freddie Mac voluntarily dismissed its limited unlawful detainer action.

Freddie Mac removed a similar suit last year. In *Carlson v. Wells Fargo Bank, NA*, No. 2:15-00109JLR (W.D. Wash. May 4, 2015), Freddie Mac brought a post-sale unlawful detainer, and, while the eviction proceeding was pending, the borrower brought a separate state court suit against Freddie Mac alleging ten causes of action which Freddie Mac removed under 28 U.S.C. § 1442, 12 U.S.C § 1452(f). Here, Brown asserted ten causes of action as counterclaims; they remain pending for “independent adjudication” after the voluntary dismissal of the limited unlawful detainer action; those counterclaims trigger removal under § 1452(f). See Wash. Civ. Rule 41(a)(3) (dismissal of counterclaims).

The remand motion fails to disclose the lack of consensus in decisions construing § 1452(f) and fails to account for the independent adjudication status of the counterclaims in this case. As established below, the record requires the denial of the remand motion and the request for a fee award.

II. TIMELINE AND FACTUAL AND PROCEDURAL BACKGROUND

March 22, 2013 Freddie Mac purchased the subject property at non-judicial foreclosure sale.¹

August 22, 2013 Freddie Mac served the post-sale eviction lawsuit.²

November 13, 2013 Freddie Mac filed the post-sale eviction lawsuit in state court.³

¹ Trustee's Deed, Dkt. # 9-2 at 12, ¶ 10.

² Declaration of Service, Dkt. # 9-2 at 23.

³ State Court Docket, Dkt. # 9-1 at 2 (entry # 1).

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May 21, 2014	The state court converted eviction lawsuit to a general proceeding. ⁴
January 26, 2015	Freddie Mac moved for summary judgment on its eviction claims originally noting the hearing for March 6, 2015 – no hearing was ever held. ⁵
February 23, 2015	Brown filed his Counterclaims against Freddie Mac, Wells Fargo and Third-Party Defendant Northwest Trustee Services, Inc. ⁶
May 22, 2015	Freddie Mac took a nonsuit on its unlawful detainer claim. ⁷
June 2, 2015	Freddie Mac removed lawsuit to this Court. ⁸

III. ANALYSIS AND ARGUMENT

A. Congress Has Made Independent Grants of Federal-Court Jurisdiction and Exceptions to the General Removal Statute.

Congress has granted federal-question jurisdiction to some federally chartered corporations. *See, e.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247505 U.S. 247, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992); *Lightfoot v. Cendant Mortg. Corp.*, 769 F. 3d 681, 682 (9th Cir. 2014) (applying *Am. Nat'l Red Cross rule* and ruling federal charter confers federal-question jurisdiction over claims brought by or against Fannie Mae.). These two cited decisions construe statutes providing the federally-chartered organization with power to “sue or be sued” “in courts of law and equity, State or Federal” in the case of the American Red Cross or “in any court of competent jurisdiction” in the case of Fannie Mae. *Lightfoot*, 769 F.3d at 683-87 (citing 36 U.S.C. § 2 and 12 U.S.C. § 1723a(a)). Congress has granted the Resolution Trust Corporation greater removal authority than is available to others. *See* 12 U.S.C.A. § 1441a(l)(3)(A); *infra* at x.

⁴ Order, Dkt. # 9-7 at 86-87. “A court presiding over a[n] unlawful detainer action may decide issues related to rightful possession of the subject property. Although the court does not sit as a court of general jurisdiction to decide issues unrelated to possession of the subject property it may resolve any issues necessarily related to the parties’ dispute over such possession.” *Port of Longview v. Int’l Raw Materials, Ltd.*, 96 Wn. App. 431, 438, 979 P.2d 917, 922 (1999) (citing references omitted). An unlawful detainer action “shall take precedence of all other civil actions” on the court’s trial calendar. RCW 59.12.130.

⁵ State Court Docket, Dkt. # 9-1 at 4 (entry # 47, 51).

⁶ State Court Docket, Dkt. # 9-1 at 4 (entry # 53).

⁷ *Id.* at 5 (entry # 71).

8 Dkt. # 1

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1 Additionally, Congress has enacted statutes directly extending the 30-day time
 2 limitation in the general removal statute (28 U.S.C. § 1446(b)) or permitting an extension of
 3 the time period. For example, the Federal Deposit Insurance Corporation (FDIC) has 90 days
 4 to remove from the date suit is filed against it or from when it is substituted as a party. 12
 5 U.S.C. § 1819(b)(2)(B).

6 More recently, as part of the Leahy-Smith America Invents Act (AIA) in 2011,
 7 Congress adopted 28 U.S.C. § 1454(b)(2) -- an exception to the well-pleaded complaint rule
 8 and known as the so-called “Holmes Group fix.” In *Holmes Group, Inc. v. Vornado Air*
 9 *Circulation Sys., Inc.*, 535 U.S. 826, 830-31, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002), the
 10 Supreme Court applied the well-pleaded-complaint rule that has long governed when a case
 11 “arises under” federal law for purposes of § 1331. “The well-pleaded-complaint rule provides
 12 that whether a case ‘arises under’ patent law “must be determined from what necessarily
 13 appears in the plaintiff’s statement of his own claim in the bill or declaration” *Id.* at 830.
 14 In *Holmes*, the Court held that “a counterclaim—which appears as part of the defendant’s
 15 answer, not as part of the plaintiff’s complaint—cannot serve as the basis for ‘arising under’
 16 jurisdiction.” *Id.* at 831. Stated another way, the Court ruled: “we decline to transform the
 17 longstanding well-pleaded-complaint rule into the ‘well-pleaded complaint-or-counterclaim
 18 rule’....” *Id.* at 831.

19 Yet, subsequently, Congress adopted the so-called “*Holmes Group* fix” in
 20 § 1454(b)(2) providing that the removal of claims arising under patent, plant variety, and
 21 copyright law can be removed by “any party” and the deadlines for removal “may be
 22 extended at any time for cause shown” under § 1454(b)(2). Therefore, on the basis of
 23 federally protected intellectual property rights a counterclaimant can remove a case. *See, e.g.,*
 24 *Donahue v. Tokyo Electron Am., Inc.*, 42 F. Supp. 3d 829, 838 (W.D. Tex. Aug. 27, 2014)
 25 (assuming notice of removal was untimely, extending the deadline for removal for cause
 26 shown under § 1454(b)(2) to permit the registration of the copyrighted work, and retaining
 27 counterclaims for copyright infringement and intellectual property rights but remanding state

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1 law claim for age discrimination).

2 Proper analysis requires construing the terms of the particular statute granting federal-
3 question jurisdiction and removal powers.

4 **B. Congress Has Made an Independent Grant of Federal-Court Jurisdiction and**
Broad Removal Rights to Freddie Mac.

5 Federal-question jurisdiction is granted in the chartering statute for Freddie Mac:
6 “[A]ll civil actions to which [Freddie Mac] is a party shall be deemed to arise under the laws
7 of the United States, and the district courts of the United States shall have original jurisdiction
8 of all such actions, without regard to amount or value.” 12 U.S.C. § 1452(f)(2). Section
9 1452(f)(3) in turn grants Freddie Mac a broad right to remove any case in state court “any
10 time before trial”:

11 (f)(3) any civil or other action, case or controversy in a court of a State, or in
12 any court other than a district court of the United States, to which the
Corporation is a party may at any time before the trial thereof be
13 removed by the Corporation, without the giving of any bond or security, to the
14 district court of the United States for the district and division embracing the
15 place where the same is pending, or, if there is no such district court, to the
16 district court of the United States for the district in which the principal office
17 of the Corporation is located, by following any procedure for removal of
18 causes in effect at the time of such removal.

19 § 1452(f)(3) (adding emphasis). Freddie Mac exercised that broad right in this case under the
20 grant of § 1452(f) that states: “**Not notwithstanding** § 1349 of Title 28 or **any other provision**
21 **of law.**” § 1452(f) (adding bold).

22 **C. Freddie Mac Exercised Its Broad Right under § 1452(f)(3) to Remove the**
Counterclaims for Independent Adjudication.

23 Freddie Mac originally filed a post-foreclosure, summary unlawful detainer action
24 under chapter 59.12 RCW.⁹ On February 23, 2015, Brown answered the summary action and
25 asserted ten counterclaims.¹⁰ On May 22, 2015, Freddie Mac dismissed the summary action
26 without prejudice.¹¹ Freddie Mac removed the counterclaims on June 2, 2015,¹² and Brown

27 ⁹ State Court Docket, Dkt. # 9-1 at 2 (entry # 2).

¹⁰ *Id.* at 4 (entry # 53).

¹¹ State Court Docket, Dkt. # 9-1 at 5 (entry # 71).

¹² Notice of Removal, Dkt. # 1.

1 has moved for remand.¹³

2 1. **Section 1452(f)(3) applies – not the general removal statute.** Brown claims
 3 that Freddie Mac was not permitted to remove this matter, because it was a plaintiff and 28
 4 U.S.C. § 1441(a) permits removal only by a “defendant.”¹⁴ While the general removal
 5 statute’s § 1441(a) does allow removal only by “a defendant,” 12 U.S.C. § 1452(f)(3) permits
 6 removal “of any civil or other action... to which the Corporation [Freddie Mac] is a *party*[.]”
 7 The reasonable reconciliation of these statutes is that while parties may only remove actions
 8 as defendants under the general removal statute, Freddie Mac under its § 1452(f)(3) rights
 9 may remove an action if it is a counterclaim defendant, or more specifically in this case if it
 10 has dismissed its own very narrow claims asserted in a summary proceeding.

11 The cases cited by Brown do not address the procedural position of this case. First,
 12 Brown cites cases that stand for the basic proposition that a plaintiff cannot remove even if
 13 served with counterclaims, because § 1441(a) permits removal only by a “defendant.” Resp.
 14 5, Dkt. 11. But these are not Freddie Mac cases discussing the special right to remove under
 15 § 1452(f)(3).

16 Next, Brown cites *Ocwen v. Mickna*, 2015 WL 685264 at *2, *6 (W.D. Ark. Feb. 17,
 17 2015), but no counterclaims were asserted against Freddie Mac in that case. Instead, Freddie
 18 Mac removed the case purely as a plaintiff after it was about to receive a negative result.¹⁵
 19 Brown also cites *Freddie Mac v. Amersey*, 2014 WL 1400086 (E.D. Mich. Apr. 9, 2014), but
 20 once again this is a case without counterclaims – Freddie Mac attempted to remove it in a
 21 purely plaintiff capacity.¹⁶

22 2. **Section 1452(f)(3)’s broad right to remove “any action ... to which**
 23 **[Freddie Mac] is a party at any time before trial” authorizes removal when Freddie Mac**
 24 **becomes a counterclaim defendant before trial.”** Brown ignores two district court cases in

25 _____
 26 ¹³ Dkt. # 11.
 27 ¹⁴ Mot. 4-5, Dkt. # 11.
¹⁵ Mot. 6, Dkt. No. 11.
¹⁶ *Id.*

1 Alabama where Freddie Mac was permitted to remove after becoming a counterclaim
 2 defendant, and cites one case where the court granted remand. *Compare Fed. Home Loan*
 3 *Mortg. Corp. v. Pihakis*, No. CV-13-S-1094-S, 2013 WL 3874524 (N.D. Ala. July 25, 2013)
 4 (denying remand); *Freddie Mac v. Brooks*, No. 3:11cv313-WHA (WO), 2011 U.S. Dist.
 5 LEXIS 71523, 2011 WL 2619132, *4-8 (M.D. Ala. July 1, 2011) (denying remand) *with*
 6 *Freddie Mac v. Shaffer*, 2014 WL 7180777 (N.D. Ala. Dec. 16, 2014) (cited by Brown).

7 There is no “consensus” among district courts that have considered this issue.¹⁷ The
 8 better reasoned authority supports removal by Freddie Mac in the capacity as a counterclaim
 9 defendant under the “any party” term.

10 The plain language of § 1452(f), especially when considered in contrast to §
 11 1441(a), the general removal statute, indicates that Freddie Mac need not be a
 12 defendant to remove a case to federal court. Section 1452(f), unlike § 1441(a),
 13 does not state that the action “may be removed by the defendant or the
 14 defendants,” rather, it states that Freddie Mac may remove “any civil or other
 15 action, case or controversy . . . to which [Freddie Mac] is a party.” There is no
 16 limitation, in § 1452(f), that the removing party be a “defendant,” rather, the
 17 prerequisite at issue is simply that Freddie Mac be a “party” to the case. As a
 18 Plaintiff/Counterclaim Defendant in this case, Freddie Mac is unquestionably
 19 a “party.”

20 *Mac v. Brooks*, 2011 U.S. Dist. LEXIS 71523, *7; *accord, In re Franklin Nat'l Bank Sec.*
 21 *Litig. v. Anderson*, 532 F.2d 842, 843 (2d Cir. 1976) (approving removal by Freddie Mac on
 22 its status as receiver of national bank notwithstanding its status as party plaintiff).

23 Section 1452(f)(3)’s “any party” category is broader than the “defendant” category
 24 used in other special removal statutes. *Compare Westwood Apex v. Conteras*, 644 F.3d 799
 25 (9th Cir. 2011) (ruling “removed by any defendant” does not permit plaintiff/counterclaim
 26 defendants and third-party defendants under Class Action Fairness Act of 2005 (“CAFA”), 28
 27 U.S.C. § 1453(b)) *with* 18 U.S.C. § 1452(f)(3) (stating “any civil or other action, case or
 28 controversy in a court of a State, or in any court other than a district court of the United
 29 States, to which the Corporation is a party may at any time before the trial thereof be removed

26 ¹⁷ See *Fed. Home Loan Mortg. v. Litano*, No. 3:15-10019-MAP, 2015 U.S. Dist. LEXIS 71066, *3 (D. Mass.
 27 Mar. 30, 2015) (“It cannot be said that a consensus has emerged among the district courts that have considered
 the issue raised here.”)

1 by the Corporation"). Section 1452(f)(3)'s direction for removal "following any
 2 procedure for removal" must be construed in view of § 1452(f)(3)'s grant of a substantive
 3 right to removal in "any action ... to which [Freddie Mac] is a party may at any time before
 4 trial be removed." That specific right trumps the general procedure for removal merely by
 5 defendants, within 30 days of service of the complaint, or of another paper first indicating
 6 removability under 28 U.S.C. § 1446 (Procedural for removal of civil actions).

7 **3. Freddie Mac's nonsuit of its summary unlawful detainer action leaves the**
counterclaims as an independent action subject to removal under § 1452(f)(3). *Shaffer*
 8 and its progeny are distinguishable on an additional ground: Freddie Mac *did not* dismiss its
 9 affirmative claims before removing in *Shaffer*, but Freddie Mac did dismiss its affirmative
 10 claims before removing this case on the basis of the counterclaims.¹⁸

11
 12 This case is most similar to the Ninth's Circuit's *Mendoza* decision. *Mendoza v. Fed.*
 13 *Nat'l Mortg. Ass'n*, 469 F. App'x 544 (9th Cir. 2012). In *Mendoza*, as in this case, Freddie
 14 Mac filed a post-foreclosure eviction action in state court. 469 F. App'x at 545. The
 15 plaintiffs then filed a class action complaint as a separate action in the same court. *Mendoza*
 16 Compl., Dkt. # No. 37 at 12. Freddie Mac dismissed the eviction action and then removed the
 17 class action complaint. 469 F. App'x at 546 ("Freddie Mac and Fannie Mae filed the
 18 unlawful detainer actions before the plaintiffs filed these actions, and thereafter voluntarily
 19 dismissed them.") The district court remanded the case *sua sponte*, and the Ninth Circuit
 20 reversed. *Id.*

21
 22 The Ninth Circuit focused on whether Freddie Mac and Fannie Mae had manifested its
 23 intent to litigate the plaintiffs' claims in state court (waiving their removal rights) and applied
 24 the rule that "[i]n general, the right of removal is not lost by action in the state court short of
 25 proceeding to an adjudication on the merits." *Id.* (citing *Resolution Trust Corp. v. Bayside*
Developers, 43 F.3d 1230, 1240 (9th Cir. 1994)).

26 In *Bayside Developers*, the statutory language provided that the Resolution Trust
 27

¹⁸ Dkt. # 1-2 (Answer and counterclaims).

1 Corporation (“RTC”) ‘may remove any action, suit or proceeding from a State court to the
 2 United States district court ...’ and the Ninth Circuit concluded: “Nothing in the removal
 3 statute limits the stage at which the RTC may remove.” *Bayside*, 43 F.3d at 1236. “Rather, §
 4 1441a(l)(3) ‘gives the RTC greater removal authority than that available to others.’” “The
 5 RTC is only bound by final unappealable judgments entered before its appointment.”
 6 *Bayside*, 43 F.3d at 1236 (quoting 12 U.S.C.A. § 1441a(l)(3)(A) and *Hellon & Assocs., Inc. v.*
 7 *Phoenix Resort Corp.*, 958 F.2d 295, 299 (9th Cir. 1992)).

8 Section 1452(f)(3) grants Freddie Mac similar broad removal rights. The voluntary
 9 dismissal of the summary unlawful detainer action permitted Brown’s broader counterclaims
 10 to remain pending for independent adjudication under Washington Civil Rule 41(a)(3). “If a
 11 counterclaim has been pleaded by a defendant prior to the service upon the defendant of
 12 plaintiff’s motion for dismissal, the action shall not be dismissed against the defendant’s
 13 objection unless the counterclaim can remain pending for independent adjudication by the
 14 court.” Wash. CR 41(a)(3).¹⁹ Therefore, by operation of the civil rule, Brown’s
 15 counterclaims are effectively an independent “action” triggering § 1452(f)(3) rights. Section
 16 1452(f)(3) grants Freddie Mac the right to remove “any civil or other action, case or
 17 controversy ... to which the Corporation is a party may at any time before the trial” §
 18 1452(f)(3) (adding emphasis).

19 In the procedural posture of this case, Brown’s civil counterclaims are an independent
 20 adjudication just as if he had brought the separate class-action in *Mendoza* or the separate ten-
 21 count complaint in *Carlson*. *Mendoza v. Fed. Nat. Mortg. Ass’n*, 469 F. App’x 544 (9th Cir.
 22 2012); *Carlson v. Wells Fargo Bank, NA*, No. C15-0109JLR (W.D. Wash. May 4, 2015). If
 23 Brown decided to voluntarily dismiss the counterclaims without prejudice when Freddie Mac
 24 nonsuited the unlawful detainer action, then Freddie Mac could have brought a declaratory
 25 judgment suit against Brown in federal court under § 1452(f)(1). The result should not be
 26

27 ¹⁹ *Accord*, Federal Civil Rule 41(a)(2) (if defendant has pleaded counterclaim, then the action may be dismissed
 over the defendant’s objection only if the counterclaim will remain pending for “independent adjudication.”)

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1 different merely because Brown elected independent adjudication of the counterclaims after
 2 the nonsuit, especially in view of Freddie Mac's broad removal rights.

3 **4. The policies underlying the revival exception support the removal of the**
 4 **ten-counterclaims for independent adjudication.** Here, Freddie Mac's status as a party
 5 radically changed when Brown brought his counterclaims. The counterclaims assert ten
 6 causes of action (including criminal profiteering, theft, and mortgage fraud) and joined two
 7 third-party defendants. Dkt. # 1-2. These counterclaims do not fall within the narrow
 8 exception to the general rule that "[c]ounterclaims may not be asserted in an unlawful detainer
 9 action." *Fed. Nat'l Mortg. Ass'n v. Ndiaye*, --- P.3d ---, 2015 WL 3755067, *3 (Wn. App.
 10 June 16, 2015); *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 209, 741 P.2d 1043
 11 (1987) (unlawful detainer defendant was not permitted to raise defenses or counterclaims
 12 alleging breach of the Truth in Lending Act, intentional infliction of emotional distress,
 13 defamation, slander of title, breach of contract, abuse of process, outrage, fraud, malicious
 14 prosecution, usury, or unjust enrichment).

15 For the same reasons that the amendment of a complaint may revive a removal period
 16 if it changes the character of a suit so as to make a substantially new suit, the ten-count
 17 counterclaim and the dismissal of the summary action either extended or revived the removal
 18 period. *Compare SRSEN v. State Farm Mutual Auto. Ins. Co.*, No. C14-5676 RBL, 2014 U.S.
 19 Dist. LEXIS 159956 (W.D. Wash. Nov. 13, 2014) (considering the revival exception but
 20 declining to apply it to the case before it); *Kuxhausen v. BMW Financial Services NA LLC*,
 21 707 F.3d 1136, 1142 n.5 (9th Cir. 2013) (stating "[i]n light of that conclusion [that removal
 22 was timely under the § 1446(b), we have no occasion to decide whether to join other
 23 circuits[5] in recognizing a "revival exception,"....) with Wilson v. Intercollegiate (Big Ten)
 24 Conference A. A., 668 F.2d 962 (7th Cir. 1982); *Braud v. Transport Serv. Co. of Illinois*, 445
 25 F.3d 801, 806 & n.10 (5th Cir. 2006) (quoting 14C Wright, Miller & Cooper, Federal Practice
 26 and Procedure, § 3732 at 311-48). Therefore, the independent adjudication of the
 27

1 counterclaims triggered Freddie Mac's right to removal under § 1452(f)(3), and the Motion to
 2 Remand should be denied.

3 **D. Freddie Mac's Removal was Timely Under § 1452(f)(3).**

4 12 U.S.C. § 1452(f)(3) grants Freddie Mac the right to remove cases "at any time
 5 before trial[.]" Yet, Brown contends that 28 U.S.C. § 1446(b)(1)'s general removal
 6 requirements required Freddie Mac to remove within 30 days after being served with his
 7 counterclaims.²⁰ The statutes' plain text and the canons of construction refute Brown's
 8 construction that improperly elevates the more general statute over the more specific statute.
 9 "[W]hen two statutes cover the same situation, the more specific statute takes precedence over
 10 the more general one." *White v. Lambert*, 370 F.3d 1002, 1008 (9th Cir. 2004). Therefore,
 11 the more specific statute whose "any time before trial" term grants a special prerogative to
 12 Freddie Mac takes precedent over the general statute requiring a 30-day deadline for regular
 13 defendants. Indeed, in *Amersey*, which Brown himself cites, the court held that the 30-day
 14 period under § 1446(b)(1) does not apply to Freddie Mac. "I first note that the chartering
 15 statute does squarely change the timing for Freddie Mac to remove cases from the 30-day
 16 period in the general removal statute[.]"). *Amersey*, 2014 WL 1400086, at *2. Therefore, the
 17 argument that Freddie Mac had to remove the case within 30 days fails.

18 **E. The Removal of the Independent Adjudication of the Counterclaims is Equitable.**

19 The final section of the Motion to Remand argues that Freddie Mac should be denied
 20 access to this Court, because its removal was inequitable.²¹ Brown contends that Freddie Mac
 21 consented to the jurisdiction of the state court by filing its summary unlawful detainer action
 22 there and so should remain in that forum.²² Brown cites to a laundry list of actions that
 23 Freddie Mac took supposedly manifesting its intent to litigate in state court.²³ Yet, all of these
 24 actions occurred before Brown filed his counterclaims.²⁴ Freddie Mac does not dispute that it

25²⁰ Mot. 7, Dkt. # 11.

26²¹ Mot. 11-13, Dkt. No. 11.

²² *Id.*

²³ Mot. 9-10, Dkt. # 11.

²⁴ Compare *id.* with State Court Docket, Dkt. # 9-1 at 4 (entry # 53).

1 attempted to litigate is unlawful detainer claims in state court. But shortly after Brown filed
 2 the counterclaims, Freddie Mac struck its summary judgment motion, dismissed its
 3 affirmative summary proceeding claims, and removed the case. Freddie Mac did not manifest
 4 any intent to litigate the counterclaims – the only live claims in this case – in state court.

5 Brown raised counterclaims that could not be resolved in the limited forum of the
 6 unlawful detainer lawsuit. *See Port of Longview*, 96 Wn. App. at 438. Brown converted the
 7 narrow, summary unlawful detainer action into a general civil action.²⁵ Brown fundamentally
 8 changed the nature of the narrow action by asserting ten counterclaims. After Brown brought
 9 those counterclaims and before the Court granted any other relief or made any other rulings,
 10 that Freddie Mac removed the counterclaims.²⁶

11 Brown attempts to compare the procedural history of this case to that of *Mickna*.²⁷ In
 12 *Mickna*, unlike here, there were no counterclaims. 2015 WL 685264 at *1-2. Moreover, in
 13 *Mickna*, the defendant moved to dismiss Freddie Mac's affirmative claims, the state court
 14 granted the motion, and requested that the parties draft an order to that effect. *Id.* In that very
 15 different context, Freddie Mac removed and was accused of forum shopping. *Id.*

16 The state court has made no similar dispositive decisions on the counterclaims
 17 asserted in this case. Brown's counterclaims seek equitable relief and damages from Freddie
 18 Mac. Congress has determined that Freddie Mac has the right to defend against these claims
 19 in federal court. 12 U.S.C. § 1452(f)(3). Thus, Freddie Mac's removal of this case was
 20 proper; the motion to remand should be denied.

21 **F. The Absence of Appellate Precedent on the Removal under § 1452(f)(3) of an**
Independent Adjudication of Counterclaims Precludes a Fee Award.

22 Brown requests the discretionary award of attorney fees and costs if the court grants
 23 remand.²⁸ 28 U.S.C. § 1447(c) ("may require payment"). The record does not support his
 24 request. "There is no presumption in favor of awarding fees following a remand, and the use
 25

26 ²⁵ See Mot. 2 (procedural history of case).

27 ²⁶ Mot. 2, Dkt. # 11.

28 ²⁷ *Id.* at 12.

²⁸ *Id.* 13.

1 of the term ‘may’ in Section 1447(c) leaves the district court with discretion, with no heavy
 2 congressional thumb on either side of the scales.” *Martin v. Franklin, Capital Corp.*, 546
 3 U.S. 132, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). In *Martin*, the Court held: “[A]bsent
 4 unusual circumstances, courts may award attorney’s fees under § 1447(c) only when the
 5 removing party lacked an objectively reasonable basis for removal. Conversely, when an
 6 objectively reasonable basis exists, fees should be denied.” *Id.* at 141.

7 “[R]emoval is not objectively unreasonable solely because the removing party’s
 8 arguments lack merit, or else attorney’s fees would always be awarded whenever remand is
 9 granted.” *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008). The
 10 objective reasonableness of a removal depends on the clarity of the applicable law and
 11 whether such law “clearly foreclosed” the arguments in support of removal. *Id.* at 1066-67
 12 (citing *Lott v. Pfizer, Inc.*, 492 F.3d 789, 793 (7th Cir. 2007) (“[I]f clearly established law did
 13 not foreclose a defendant’s basis for removal, the district court should not award attorney’s
 14 fees.”)).

15 Where a defendant’s interpretation of the statute authorizing removal was not
 16 objectively unreasonable, fees are denied. *See Lussier v. Dollar Tree*, 518 F.3d at 1063
 17 (affirming denial of fees). *Id.* (concluding “the district court did not abuse its discretion in
 18 finding that the lack of clarity in the law at the time, … removal arguments were not
 19 unreasonable” under the Class Action Fairness Act of 2005 (CAFA) for a putative class-
 20 action for wages by employees). *Id.* at 1064 (stating district court ruled Dollar Tree raised
 21 novel issues under CAFA and district courts were divided on the meaning of “commenced” in
 22 other contexts). *Id.* at 1063 n.1; *id.* at 1066-67 (Dollar Tree’s arguments were not clearly
 23 foreclosed, where it cited one circuit court opinion, and argued the opinion was
 24 distinguishable).

25 At the very least, Freddie Mac has demonstrated that the lack of clarity in the law;
 26 therefore, it had an objective basis for the removal, and fees should be denied.

27
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IV. CONCLUSION

Brown asserted ten causes of action as counterclaims; they remain pending for “independent adjudication” after the voluntary dismissal of the limited unlawful detainer action. Those counterclaims trigger removal under § 1452(f). Therefore, Freddie Mac respectfully requests that the Court deny the motion for remand.

DATED: July 6, 2015.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the attorneys of record.

I affirm under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge.

SIGNED July 6, 2015 at Seattle, Washington.

s/ Peter Elton

Peter Elton

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